

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

28794

FILE:

B-213734

DATE:

July 17, 1984

MATTER OF:

Kodiak Timber, Inc.

DIGEST:

1. Protest against contracting agency's determination to permit a contractor to cure a contract breach is dismissed, since the issue involves contract administration, which is the agency's responsibility, not GAO's.
2. A contract comes into existence when an offer is accepted by the government, not when it is submitted. Further, in either sale or procurement, the acceptance must be clear and unequivocal.

Kodiak Timber, Inc. protests the Forest Service's sale of timber in the Fremont National Forest, located in Klamath County, Oregon, to Modoc Lumber Company under contract No. 063026. The protester argues that Modoc, the highest bidder, breached its contract by failing to deliver a required 5 percent cash deposit within 30 days after notice of the award. Kodiak also alleges that the Forest Service actually accepted its own subsequent offer to meet the highest bid price, thereby resulting in a contract with Kodiak for the same timber.

We dismiss the protest in part and deny it in part.

The solicitation required, in addition to a bid guarantee, a cash deposit (or the provision of effective purchaser credit) equal to 5 percent of the total bid. This amount was to be forwarded within 30 days of notice of bid acceptance. Failure to make the cash deposit would, according to the solicitation, result in a breach of contract, and the government would retain the bid guarantee as liquidated damages.

Modoc received notification of award on August 5, 1983, so that the 5 percent cash deposit was due no later than September 6. (Modoc's bid guarantee of

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\$39,900 was applied to the \$55,100 cash deposit, leaving \$15,200 due.) Modoc failed to provide the deposit balance on time, but attempted to forward payment on the morning of September 7. The Forest Service, however, retained Modoc's \$39,900 bid guarantee; returned the \$15,200 check Modoc had sent; informed Modoc that the failure to furnish the deposit within the specified time had resulted in a breach of contract; and advised that the sale would be offered at the highest price bid to the remaining qualified bidders in the order of their bids. In this respect, Forest Service regulations, 36 C.F.R. § 223.5(g) (1983), provide that:

"Forest Officers may sell, within their authorization, without further advertisement, at not less than the appraised value . . . any timber on uncut areas included in a contract which has been terminated by abandonment, cancellation, contract period expiration, or otherwise if such timber would have been cut under the contract. . . ." (Emphasis added.)

The Forest Service then notified other bidders of the reoffering, and Kodiak, the next highest bidder, returned a bid.

Modoc subsequently challenged the Forest Service's actions, noting that the Modoc-Forest Service contract expressly required the Forest Service to allow the purchaser 30 days to remedy a breach of contract. Modoc therefore forwarded a cashier's check for \$55,605.10; \$55,100 constituted the initial 5 percent cash deposit and \$505.10 was for interest calculated at 11 percent per year. The firm proposed that the Forest Service also keep the bid guarantee as liquidated damages. The Director of the Timber Management Branch of the Forest Service agreed with Modoc's position, and the contracting officer therefore returned Kodiak's sealed bid unopened, informing it that the award of the sale to Modoc had been consummated.

Kodiak contends that by its breach of contract, Modoc terminated its contractual relationship with the Forest Service.

We dismiss this complaint.

The contract, which came into existence when the Forest Service accepted Modoc's bid, expressly provides for a 30-day remedy period for breach, with the retention of any bid deposit by the government as liquidated

damages. A contractor's compliance with its contractual obligations is a matter for the procuring agency in the administration of the contract, not our Office. Fancy Industries, Inc., B-209156, Nov. 8, 1982, 82-2 CPD ¶ 415. We have no basis to object to the Forest Service's allowing Modoc to cure its failure to furnish a timely cash deposit.

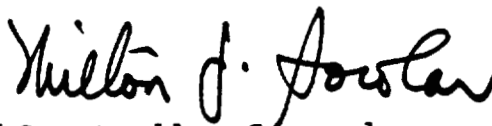
Kodiak also contends that as next highest bidder, its forwarding of a bid and bid deposit at the Forest Service's invitation resulted in an automatic award.

We deny the protest on this issue.

It is fundamental that a firm's offer to contract with the government is just that--an offer--and that the act necessary to establish a contractual relationship thus is not the submission of a bid, but the government's acceptance of that bid. Further, the acceptance must be clear and unequivocal, regardless of whether the resulting contract is for the sale of timber, 49 Comp. Gen. 431 (1970), or the procurement of goods or services. Northpoint Investors, B-209816, May 17, 1983, 83-1 CPD ¶ 523.

Here, as the Forest Service points out in its report on Kodiak's protest, the sale solicitation stated that "a written award mailed (or otherwise furnished) to the successful bidder shall be deemed to result in a bidding contract." No such notice was furnished to Kodiak. Finally, the invitation to Kodiak and other firms to match Modoc's offer was accompanied by an explicit reservation by the Forest Service of its right to reject any and all bids.

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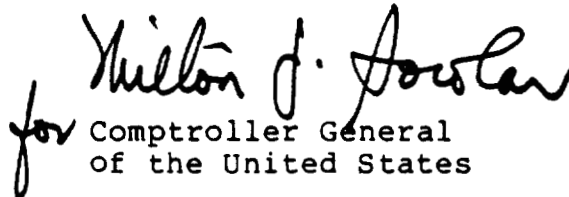
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